85-847

Supreme Court, U.S.
FILED
OCT 22 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. ____

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1985

JOHN MASON, et al

PETITIONERS,

v.

THE CONTINENTAL GROUP, INC.,
CONTINENTAL CAN, U.S.A.
AND THE UNITED STEELWORKERS OF AMERICA
AFL-CIO-CLC,

RESPONDENTS

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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763 F.2d 1219

JOHN MASON, III, et al.,
Plaintiffs-Appellants,
v.
CONTINENTAL GROUP, INC., et al.,
Defendants-Appellees.
No. 83-7479.
United States Court of Appeals,
Eleventh Circuit.
June 21, 1985.

Former employees brought suit against their former employer alleging breach of contract, intentional and willful fraud, breach of state law fiduciary requirements and a violation of their statutory rights under the Employee Retirement Income Security Act. Employees also brought suit against their union alleging a breach of the duty of representation and conspiracy to defraud. The United States District Court for the Northern District of Alabama, 569 F. Supp. 1241, Lynne, J., granted summary

judgment for both employer and union, and employees appealed. The Court of Appeals, Roney, Circuit Judge, held that: (1) having agreed to such a broad arbitration clause, former employees were bound to submit to the grievance and arbitration process their state law fraud claims, which were based on allegations that employer closed its Alabama plant in order to avoid employment obligations to its employees after having induced employees to continue working on the representation that the plant would remain in operation; (2) former employees were not excused from pursuing their wrongful termination claims under collective bargaining agreement where they failed to establish the futility of doing so; and (3) former employees were required to exhaust their remedies under pension plan agreement before they could bring their claims involving violations of ERISA's statutory provisions in federal court.

Affirmed.

1. Labor Relations 416.1

Employees claiming breach of a collective bargaining agreement or wrongful termination of employment by their employer are bound by that agreement's terms providing a method for resolving disputes between them and their employer.

2. Labor Relations 416.1

When employees asserting an arbitrable grievance have not attempted to utilize the dispute resolution machinery available to them under collective bargaining

agreement, their independent suit against the employer must be dismissed.

3. Labor Relations 416.1

Having agreed to such a broad arbitration clause, former employees were bound to submit to the grievance and arbitration process their state law fraud claims, which were based on allegations that employer closed its Alabama plant in order to avoid employment obligations to its employees after having induced employees to continue working on the representation that the plant would remain in operation.

4. Labor Relations 416.1

Test for "futility" in submitting claim to arbitration is not whether the employees' claims would succeed, but whether employees could have availed themselves of the grievance procedure.

5. Labor Relations 416.1

Former employees were not excused from pursuing their wrongful termination claims under collective bargaining agreement where they failed to establish the futility of doing so.

6. Labor Relations 416.1

Former employees were required to exhaust their remedies under pension plan agreement before they could bring their claims involving violations of ERISA's statutory provisions in federal court. Employee Retirement Income Security Act of 1974, §§ 502(a)(3), 503, 510, as amended, 29 U.S.C.A. §§ 1132(a)(3), 1133, 1140.

J. Gusty Yearout, Birmingham, Ala. for plaintiffs-appellants.

Robert H. Stroop, Jr., Jerome A. Cooper, Birmingham, Ala., for United Steelworkers of America, AFL-CIO.

Sydney F. Frazier, Jr., Birmingham, Ala., for Continental Group.

Appeal from the United States District Court for the Northern District of Alabama.

Before RONEY and ANDERSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

RONEY, Circuit Judge.

Plaintiffs, former employees of Continental Can Company, claim the company closed its Alabama plant in order to avoid employment obligations to its employees, after having induced plaintiffs to continue as employees on the representation that the plant would remain in operation. They brought a suit against the company alleging breach of contract, intentional and willful fraud, and breach of state law fiduciary requirements, and against the union alleging a breach of the duty of representation and conspiracy to defraud. Plaintiffs also assert a violation of their statutory rights under the

Employee Retirement Income Security Act of 1974 ("ERISA").

The district court, 569 F. Supp. 1241 (D.C. Ala. 1983) granted summary judgment for both the employer and the union, holding that plaintiffs' remedy lay in the grievance and arbitration procedures of the collective bargaining agreement, and that failure to exhaust those remedies foreclosed this litigation. We affirm.

The appeal raises issues as to (1) whether the company's alleged conduct is subject to the collective bargaining agreement, (2) if so, whether plaintiffs should be excused from exhausting remedies provided in that agreement; (3) whether the state law cause of action for breach of fiduciary duty is preempted by the National Labor Relations Act; (4) whether ERISA claims are subject to pension plan appeals procedures; and (5) whether Continental Can was a fiduciary under ERISA and subject to the duties imposed by the Act.

The decision of the first two issues turns on the collective bargaining agreement in force at the time. Since we hold that the claims should have been submitted to arbitration, we need not decide the third point, whether the state law breach of duty claim is preempted by the Labor Relations Act. The fourth and fifth points require an analysis of ERISA, but there too, we decide that exhaustion of administrative remedies must precede a court suit.

Plaintiffs, thirty-six employees at Continental Can's

Plant No. 411 in Fairfield, Alabama, until the plant was closed on December 21, 1979, were at all times relevant to this case members of the collective bargaining unit represented by the United Steel Workers of America, AFL-CIO, subject to the collective bargaining agreement, insurance agreement, and pension plan entered into between Continental Can and the union. Because of changes in can manufacturing technology, in 1975 Continental Can began planning for gradual transition that would eventual ly result in the closing of Plant No. 411 in 1979 and the concurrent opening of a new plant in Atlanta, Georgia. Continental Can first announced the closing of Plant No. 411 to the employees in September 1979, two months before the event actually occurred. Layoffs of employees continued over the next two months, and the plant ceased operations on December 21, 1979.

Plaintiffs originally filed this action against Continental Can in state court on November 16, 1980. They claimed damages "for wrongful termination, for the deprivation of employee benefits, pension retirement benefits, comprehensive employee benefits, seniority rights, [and] mental anguish" resulting from the closing of Plant No. 411. They alleged that Continental Can, prior to the closing announcement, had made various fraudulent misrepresentations that they would have continuous employment with Continental Can until they reached retirement age as long as they performed their

jobs satisfactorily. They contended that these and other misrepresentations induced them to continue their employment at the plant even though they would have obtained other jobs had they known Continental Can's intentions of closing down the plant and terminating their employment.

Predicating federal jurisdiction on section 301 of the Labor Management Relations Act, 29 U.S.C.A. § 185, Continental Can removed the case to federal district court and moved for summary judgment on the grounds that plaintiffs' grievances were arbitrable under the collective bargaining agreement and that they had made no effort to resolve their claims through the grievance and arbitration procedures provided in that agreement. Plaintiffs subsequently amended their complaint twice. First, plaintiffs added the ERISA claims against Continental Can, alleging that Continental Can had terminated their employment out of a desire to interfere with plaintiffs' attainment of rights and benefits under the comprehensive benefit program administered by Continental Can. Second, plaintiffs added the union as a party defendant, alleging that the union had breached its duty of fair representation owed to the plaintiffs by failing to file and prosecute plaintiffs' claims through the grievance and arbitration procedures, and that the union had conspired with Continental Can to deprive the plaintiffs of their rights under the collective bargaining agreement. The union also moved for summary judgment.

On July 27, 1983, the district court granted both defendants' motions for summary judgment. As to the union, the court held that plaintiffs' claims were barred by the applicable six month statute of limitations. Plaintiffs do not appeal that decision.

As to the Company, the district court held that notwithstanding the state law fraud claims, the plaintiffs' complaints fell within the scope of the grievance and arbitration provisions. The court determined that it was "incumbent upon plaintiffs to attempt, unless otherwise excused, to present their complaints concerning 'fraud' and breach of some 'contract' other than the collective bargaining agreement through the grievance mechanism...." The court considered and rejected plaintiffs' arguments that they were excused from resorting to those procedures because it would have been futile. The court went on to find that an exhaustion of remedies requirement barred plaintiffs' ERISA claims because they had not invoked the arbitration procedures provided by the pension plan agreement.

Exhaustion of Remedies Under
Collective Bargaining
Agreement

[1,2] Employees claiming breach of a collective bargaining agreement or wrongful termination of employment by their employer are bound by that agreement's terms providing a method for resolving disputes between them and their employer. Hines v.

Anchor Motor Freight, Inc., 42 U.S. 554, 563, 96 S. Ct. 1048, 1055, 4 L.Ed. 2d 231 (1976); Vaca v. Sipes, 386 U.S. 171, 184-85, 87 S. Ct. 903, 913-14, 1 L.Ed. 2d 842 (1967). When employees asserting an arbitrable grievance have not attempted to utilize the dispute resolution machinery available to them under the agreement, their independent suit against the employer must be dismissed. Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 85 S. Ct. 614, 13 L.Ed. 2d 580 (1965).

[3] It is undisputed that the plaintiffs have never initiated a grievance against Continental Can concerning the closing of Plant No. 411 or any misrepresentations made prior to the announcement of the closing. Plaintiffs contend, however, that their state law fraud claims under the Alabama fraud statute are separate and independent from the collective bargaining agreement. Ala. Code §§ 6-5-101 to -104 (1977).

In United Steelworkers of America v. Warrior & Gulf Navigation Co. 363 U.S. 574, 80 S. Ct. 1347, 4 L.Ed. 2d 1409 (1960) the Supreme Court provided guidance for determining when disputes are arbitrable under a collective bargaining agreement. The question is whether the reluctant party did agree to arbitrate the grievance. The Court directed that the arbitration provisions of an agreement should be broadly construed to encompass all claims that the employees have been terminated wrongfully and deprived of benefits guaranteed by the agreement unless the subject of the dispute is clearly

excluded from the grievance procedure. Id. at 582-83, 80 S. Ct. at 1352-53. Questions of arbitrability are left to the arbitrator if there is a clear demonstration that the parties so intended. Id. at 583 n. 7, 80 S. Ct. at 1353 n. 7.

The grievance and arbitration provisions in the collective bargaining agreement between Continental Can and the union were quite broad.

> 13.1 Purpose
>
> The purpose of this Article is to provide an opportunity for discussion of any request or complaint and to establish a procedure for the processing and settling of grievances, as defined in Section 13.2.
>
> 13.2 Definition
>
> A grievance is defined as any difference between the Local Management and the Union or employees as to the interpretation or application of or compliance with the Agreement respecting wages, house, or conditions of employment. Any dispute over whether the complaint is subject to these procedures shall be handled as a grievance in accordance with the procedures prescribed herein.

Section 13.2 clearly supports the district court's decision that plaintiffs were required to submit to arbitration the question of whether the definition of "grievance" included a complaint concerning alleged misrepresentations made by Continental Can with regard to the closing of Plant No. 411. Having agreed to such a broad arbitration clause, plaintiffs are bound to submit arguably extrinsic claims, such as fraud, to the grievance and arbitration

process. Cf. International Union of Operating Engineers, Local 150 v. Flair Builders, Inc., 406 U.S. 487, 491-92, 92 S. Ct. 1710, 1712-13, 32 L.Ed. 2d 148 (1972) (laches defense submitted to arbitral process where agreement to arbitrate extends to "any difference").

In holding that plaintiffs could not separate their fraud claims from the collective bargaining agreement, the district court relied heavily on its prior decision in Reese v. Mead Corp., 79 Lab.Cas. (CCH) ¶ 11,732 (N.D. Ala.1975), aff'd mem., 529 F. 2d 1350 (5th Cir. 1976). In Reese, plaintiff employees claimed their employer had deprived them of seniority and pension rights by misrepresentations on which plaintiffs had decided whether to elect certain options under the collective bargaining agreement or to remain on layoff. Plaintiffs claimed that their reliance on these misrepresentations regarding their future employment gave rise to a cause of action based on the Alabama fraud statutes. As in the current case, none of the plaintiffs had attempted to institute the grievance procedures under the governing collective bargaining agreement. The court granted summary judgment for the employer, stating that given federal labor policies and the broad arbitration clause in the agreement, "it would seem entirely inappropriate to conclude that employees could cast aside the contract grievance procedure by merely alleging that statements made by the employer amounted to fraud." 79 Lab.Cas. (CCH) ¶ 11,732, at 22,005.

Plaintiffs argue that the fraud claims in Reese were

different because the seniority and pension rights of which the workers were allegedly deprived were "predicated on the collective bargaining agreement." Plaintiffs contend they are not seeking enforcement of a collective bargaining agreement, but asking for relief for the loss of the right "to seek gainful and secure employment and build four years seniority elsewhere rather than continue their work at defendant's plant." The misrepresentations in Reese, however, allegedly affected the employees' election to accept a severance allowance coupled with termination of employment rights under the contract rather than to continue their layoff status in hopes of further employment with their employer at other locations. Had the Reese plaintiffs taken the layoff option, they could have continued to build seniority at a new location, much like the plaintiffs in the current case claim they would have done at a new place of employment.

In Redmond v. Dresser Industries, Inc., 734 F. 2d 633 (11th Cir. 1984), this Court determined that an employee's breach of contract, fraud, outrage and bad faith claims all derived from his layoff by his employer and concerned rights arising under the collective bargaining agreement. There plaintiff attempted to claim both a separate individual employment agreement created by certain alleged representations made by his superiors which later turned out to be untrue and an employment agreement under the collective bargaining agreement. The plaintiff

was held to be barred from bringing suit because of his failure to attempt to follow the grievance procedures set out in the collective bargaining agreement. Id. at 634-35. See also Fristoe v. Reynolds Metals Co., 615 F. 2d 1209, 1212 (9th Cir. 1980) (rejecting plaintiff's contention that complaint alleged only common law causes of action and construing complaint as alleging breach of a collective bargaining agreement); Schwartz v. R. C. Motor Lines, Inc., 434 F. Supp. 785, 787 (E.D. Va. 1977) (applying exhaustion requirement over plaintiff's objections that complaint alleged fraud and deception on the part of the employer).

Plaintiffs argue that since a decision to shut down a plant for economic reasons does not fall within an arbitration clause covering "wages, hours and conditions of employment" under First National Maintenance Corp. v. NLRB, 452 U.S. 666, 101 S. Ct. 2573, 69 L.Ed. 2d 318 (1981), and Weather Tamer, Inc. v. NLRB, 676 F. 2d 483 (11th Cir. 1982), a cause of action for fraudulent concealment and misrepresentation of that decision would not be covered. We disagree. First, those decisions involve questions of statutory interpretation, not contract interpretation. First National Maintenance holds that the employer's decision to close down a plant is not one of the "terms and conditions of employment" under section 8(d) of the National Labor Relations Act ("NLRA") which are mandatory subjects of bargaining under NLRA § 8(a)(5). Weather Tamer merely holds that the employer was not

guilty of closing down the plant for the purpose of discouraging union activity, citing First National Maintenance for the proposition that the employer can indeed shut down the plant for economic reasons without consulting the union. 676 F. 2d at 493.

Second, the plaintiffs do not base their cause of action on the decision to close the plant, but on management relations to plaintiffs which are conceptually separate from the closing of the plant.

[4,5] Plaintiffs argue that even if the contract grievance provisions are found to cover the issues they raise, they were excused from pursuing their claims under the collective bargaining agreement because to do so would have been "wholly futile." Plaintiffs contend that they were advised by union officials that the plant closing was not arbitrable and therefore to require plaintiffs to exhaust their contract remedies would have been "futile." The test for "futility" is not, however, whether the employees' claims would succeed, but whether the employees could have availed themselves of the grievance procedure. Republic Steel Corp. v. Maddox, 379 U.S. at 659, 85 S. Ct. at 619. The district court notes that the employees had two months between the closing announcement and the plant shutdown during which they had "full opportunity to raise claims concerning the closing of the plant" or the alleged misrepresentations.

This case is a bit different from any cited. The argument is that having induced the plaintiffs to continue

their employment at the Alabama plant on false representations that the plant would remain open, the employer is liable to its employees when the plant is closed, and that this claim is not encompassed in the collective bargaining agreement. In analysis, however, the claim is for termination of employment, wrongful because the employer had represented the employment would continue. Wrongful termination of employment is grist for the arbitration mill in collective bargaining agreements. Simply characterizing the claim as a tort claim rather than a breach of contract claim is insufficient to take it out of the policy that such disputes are subject to arbitration. Plaintiffs have shown no reason to excuse the failure to pursue the remedies available to them under the collective bargaining agreement.

Exhaustion of Remedies Under Pension Plan Agreement

Around 1976 Continental Can developed and began using a computerized data base known as Bell I, which listed certain basic information on all its employees. Continental Can used Bell I in conjunction with a computer program known as Bell II to enable it to measure the current and long term employee costs of its operations. The resulting information was used for both current and future planning purposes. The existence and use of Bell I and Bell II were kept confidential.

Plaintiffs contend that Continental Can's use of Bell I and Bell II constituted violations of various ERISA

provisions. They allege that the programs enabled the company to compare its Plant No. 411 employee costs attributable to the seniority and pension systems then in effect with the costs associated with the proposed Atlanta plant using workers with less seniority. Plaintiffs argue that the confidential use of those programs by Continental Can violated Continental Can's fiduciary duties to its employees under 29 U.S.C.A. §§ 1104 and 1106, that the failure to disclose the plans violated the reporting and disclosure requirements imposed by 29 U.S.C.A. §§ 1022 and 1024, and that plaintiffs' termination by Continental Can constituted unlawful interference with protected employee rights under 29 U.S.C.A. § 1140.

Continental Can responds that plaintiffs failed to raise the fiduciary duty claims in the district court and that these claims are therefore foreclosed. Because plaintiffs' complaint only stated a cause of action for wrongful termination, Continental Can contends that the fiduciary duty claims cannot be raised on appeal. Plaintiffs first raised their ERISA claims in an amendment to their complaint on May 8, 1981. The amended complaint charged that Continental Can, as plaintiffs' "employer" under 29 U.S.C.A. § 1002(5), had "violated the provisions of 29 U.S.C.A. § 1001, et seq. by unlawfully terminating plaintiffs' employment" and that Continental Can had "terminated plaintiffs because of [its] desire to interfere with the attainment of rights

[and] benefits of plaintiffs under the plan." Plaintiffs now contend that these general allegations coupled with the original complaint's specific averment of a fiduciary relationship between Continental Can and its employees were sufficient to preserve the fiduciary duty claims for appeal. Continental Can does concede that plaintiffs' amended complaint stated a cause of action for wrongful termination under 29 U.S.C.A. § 1140 and that plaintiff had argued that theory in district court. For purposes of addressing the exhaustion argument, we assume without deciding that plaintiffs' fiduciary duty claims were sufficiently presented to the trial court.

[6] The district court concluded that plaintiffs' ERISA claims were barred due to their failure to exhaust their remedies under the pension plan agreement. Plaintiffs contend that an exhaustion requirement should only be applied to applications for or denials of benefits under the plan and not to claims involving violations of ERISA's statutory provisions, such as 29 U.S.C.A. § 1140, which provides:

> It shall be unlawful for any person to discharge ... a participant or beneficiary ... for the purpose of interfering with the attainment of any right to which such participant may become entitled to under the plan ...

Plaintiffs' allegations state a claim under this section which may be enforced through a civil action under section 502 of ERISA:

> (a) A civil action may be brought—

> (3) by a participant beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan; ....

29 U.S.C.A. § 1132(a)(3). This section, however, is silent with regard to whether exhaustion is to be required before these claims are brought in federal court.

ERISA requires that every employee benefit plan "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim: 29 U.S.C.A. § 1132(2). In accordance with that section, the pension plan before us contains an appeals procedure.

> Any difference that may arise between you and the Company concerning your application for, entitlement to or the amount of payment of a lump sum retirement allowance, pension or deferred benefit may be taken up as a grievance in accordance with the applicable provisions of the Master Agreement beginning at step 3 of the Grievance Procedure, except as provided in the Medical Review Procedure described in this Booklet.
>
> If any such grievance is appealed to arbitration in accordance with such provisions, then the arbitrator, insofar as is necessary to the determination of such grievance, has authority only to interpret and apply the provisions of the Pension Agreement. He does not have authority in any way to alter, add to or subtract from any of such provisions, and his decision on any such grievance which is properly referred to him is binding on you, the Company, and the Union. The Company and the

> Union share equally the costs of the arbitrator's charge and fees, along with any other expenses which they may mutually agree to incur.

The "Master Agreement" referred to in the pension plan provisions is the collective bargaining agreement, which provides specific steps and instructions for pursuing a grievance complaint. Although the plan states that differences "may be taken up as a grievance," similar ostensibly permissive language in a collective bargaining agreement has been held to require exhaustion of administrative remedies before commencement of a lawsuit. See Republic Steel Corp. v. Maddox, 379 U.S. 650, 658-59, 85 S. Ct. 614, 619-20, 13 L.Ed. 2d 580 (1965) ("Use of the permissive 'may' does not of itself reveal a clear understanding between the contracting parties that individual employees, unlike either the union or the employer, are free to avoid the contract procedure and its time limitations in favor of a judicial suit. Any doubts must be resolved against such an interpretation.)

The question is whether plaintiffs' claim for breach of defendants' fiduciary duties and fraudulent use of the pension plan claims grounded in statutory provisions of ERISA, should have been brought first through the plan's appeals procedures. In Kross v. Western Electric Co., 701 F. 2d 1238 (7th Cir. 1983), the Seventh Circuit applied an exhaustion requirement to alleged violations of statutory rights under ERISA. The plaintiff had brought a class action alleging that Western Electric had discharged its employees for the purpose of preventing their attainment

of vested status in the company pension plan in violation of 29 U.S.C.A. § 1140. The court held that the employees' failure to exhaust their administrative remedies under the pension plan barred their statutory claim. Id. at 1245. Although plaintiff in Kross argued as have plaintiffs in the current case, that exhaustion should apply only to violations of the provisions of a particular pension plan and not to claims involving ERISA itself, the court dismissed that argument, stating that "well-established federal policy, and supporting case law, favoring exhaustion of administrative remedies prior to bringing an ERISA based lawsuit in federal court" overrode plaintiffs' contention. Id.; see also King v. James River-Pepperell, Inc., 592 F. Supp. 54, 56 (D. Mass 1984); Delisi v. United Parcel Service, Inc., 580 F. Supp. 1572, 1575 (W.D. Pa. 1984).

The Ninth Circuit has reached a contrary conclusion in Amaro v. Continental Can Co., 724 F. 2d 747 (9th Cir. 1984). In Amaro, the Ninth Circuit rejected the exhaustion requirement for ERISA claims where the claim arises from an alleged statutory violation rather than a breach of contract. In so doing, the court distinguished its prior decision in Amato v. Bernard, 618 F. 2d 559, 567-68 (9th Cir. 1980).

In Amato v. Bernard, the court had concluded that plaintiffs' ERISA claims were barred due to their failure to exhaust their remedies under the pension plan agreement. The court held the exhaustion requirement

applied to an employee who sought a declaration of the parties' rights and duties under a pension plan subject to ERISA. Id. at 568. The court noted that the text of ERISA does not mention an exhaustion requirement. Id. at 566. Nevertheless, the court determined that the legislative history of ERISA indicated that Congress had intended for the courts to apply an exhaustion requirement. The court further reasoned that section 503 of ERISA, 29 U.S.C.A. § 1133, which requires pension plans to provide administrative procedure for persons whose claims have been denied, also suggests that claims should be exhausted through those procedures before being brought in court. As further support for its holding, the Amato v. Bernard court noted that prior interpretations of the pension plan made during the administrative process would later assist a reviewing court.

We agree with the Seventh Circuit and the Amato v. Bernard decision of the Ninth Circuit. Compelling considerations exist for plaintiffs to exhaust administrative remedies prior to instituting a lawsuit. Administrative claim resolution procedures reduce the number of frivolous lawsuits under ERISA, minimize the cost of dispute resolution, enhance the plan's trustees; ability to carry out their fiduciary duties expertly and efficiently by preventing premature judicial intervention in the decision making process and allow prior fully considered actions by pension plan trustees to assist courts if the dispute is eventually litigated. See Kross, 701 F. 2d at 1244-45; Amato v. Bernard, 618 F. 2d 559,

567-68 (9th Cir. 1980). In addition, imposing an exhaustion requirement in the ERISA context appears to be consistent with the intent of Congress that pension plans provide intrafund review procedures. 29 U.S.C.A. § 1133; see also H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess., reprinted in 1974 U. S. Code Cong. & Ad. News 4639, 5038, 5108.

We therefore hold that the district court did not err in holding that plaintiffs must exhaust their remedies under the pension plan agreement before they may bring their ERISA claims in federal court.

AFFIRMED.

569 F. Supp. 1241

JOHN A. MASON, III, et al., Plaintiffs.

v.

CONTINENTAL GROUP, INC., et al., Defendants.

Civ. A. No. CV80-L-1730-S.

United States District Court, N.D. Alabama, S.D.

July 27, 1983.

Employees brought breach of contract action against employer and breach of fair representation action against union. On motion to dismiss, the District Court, Lynne, Senior District Judge, held that: (1) claims were barred for failure to pursue grievance procedure, and (2) statute of limitations had run on any claim of breach of duty of fair representation.

Judgment for defendants.

1. Labor Relations 434.8

Collective bargaining agreement which defined grievance as any difference between local management and the union or employees as to the interpretation or application of the contract with respect to wages, hours, or conditions of employment was broad enough to encompass claims of employees that they had been wrongfully denied benefits provided by the contract when plant was closed, despite employees' claim that they

based their claims on fraudulent misrepresentations rather than breach of the collective bargaining agreement.

2. Labor Relations 416.1

It was incumbent upon employees who claimed that they were deprived of benefits to which they were entitled when plant was closed to present their complaints through grievance mechanism before maintaining court action for breach of contract or violations of ERISA. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 101 et seq.; Labor Management Relations Act, 1947, § 302(a), 29 U.S.C.A. § 195(a).

3. Labor Relations 434.8

Grievance provisions of collective bargaining agreement applied to dispute arising out of owner's decision to close plant.

4. Labor Relations 416.3

If employee can establish that his union breached its duty of fair representation in the handling of his grievance, union's breach of duty relieves the employee of express or implied requirement that disputes be settled through contractual grievance procedures.

5. Labor Relations 416.1

Contention that pursuit of grievances by individual employees would have been futile because there was no grievance or arbitration procedure available after plant had closed did not excuse employees from pursuing the grievance remedies before maintaining court action where

the plant remained open for over two months between the announcement of the closing and the actual closing.

6. Labor Relations 416.1

Employees were not excused from pursuing grievance procedures before maintaining court action for breach of contract on theory that employer had repudiated contractual procedures by closing plant.

7. Labor Relations 416.1

In the absence of any evidence of conspiracy between union and employer, employees were not excused from pursuing grievance procedures before maintaining breach of contract action against employer.

8. Labor Relations 416.1

Allegation of employees that they could not obtain punitive damages through grievance procedure did not excuse them from pursuing grievance procedures before maintaining breach of contract action against employer.

9. Limitation of Actions 46(7)

Employees' cause of action for breach of contract following closing of plaint arose at or near the time of the plant closing for limitations purposes.

10. Limitation of Actions 95(1)

Where employer filed answer to breach of contract complaint on December 29, 1980, asserting that employees' claims were subject to grievance and arbitration procedures, employees should have been aware at that time of the grievability of their claims despite

their contention that they did not discover that their complaint was subject to grievance until August 3, 1981. 11. Labor Relations 416.1

Once it is concluded that employees can maintain no action against union for breach of its duty because of the bar of the statute of limitations, the breach no longer furnishes an excuse for failure to resort to the grievance mechanisms before pursuing a claim against the employer.

Jerry O. Lorant, J. Gusty Yearout, Lorant, Harris & Yearout, P.C., Birmingham, Ala., for plaintiffs.

William F. Gardner, Sydney F. Frazier, Jr., Cabaniss, Johnston, Gardner, Dumas & O'Neal, Birmingham, Ala., for defendants.

MEMORANDUM OPINION

LYNNE, Senior District Judge.

This action has been submitted to the Court on the defendants' motions for summary judgment. Defendants are the United Steelworkers of America, AFL-CIO (hereinafter "the Union"), and the Continental Group, Inc., together with its operating division, Continental Can Company, U.S.A. (hereinafter collectively referred to as "Continental"). Plaintiffs are individuals who were employed by Continental at its Plant No. 411 in Fairfield, Alabama, until the plant was closed on December 21, 1979. At all times relevant to the allegations of the

complaint, plaintiffs were member of the collective bargaining unit represented by the Union and were subject to a written collective bargaining agreement, insurance agreement and pension plan entered into between Continental and the Union.

This action was originally filed in state court, Continental being the only defendant specifically identified in the complaint, and was removed by Continental to this court. Jurisdiction is predicated upon the provisions of § 301 of the Labor Management Relations Act, 29 U.S.C. §185(a). After Continental moved for summary judgment on the ground that plaintiffs have made no attempt to resolve their claims through the grievance and arbitration provisions contained in the collective bargaining agreement, insurance agreement and pension plan, the plaintiffs amended their complaint with leave of court to add the Union as a defendant and to assert claims against the Union, including a claim for breach of the duty of fair representation, principally based upon the Union's failure to prosecute plaintiffs' complaints through the grievance and arbitration procedure.

In their original complaint against Continental, plaintiffs claimed damages "for their wrongful termination, for the deprivation of employee benefits, pension retirement benefits, comprehensive employee benefits, seniority rights, [and] mental anguish" resulting from the closing of Plant No. 411. They allege:

> [Continental] as employer of plaintiffs, continuously throughout said employment and prior thereto, represented to and agreed with plaintiffs, that plaintiffs would have continuous employment with [Continental] until plaintiffs reached the age of 65 or until plaintiffs became otherwise eligible to receive full retirement and other benefits under a comprehensive benefit program as long as plaintiffs performed their respective jobs in a satisfactory manner. [Continental] further represented and promised additional employee benefits including, but not limited to, extended vacation after employment with [Continental] for ten years.

Plaintiffs contend that Continental breached its agreement by terminating their employment, that the termination gives rise to a cause of action under the Alabama fraud statutes, see Ala. Code §§ 6-5-101 to 104 (1975), and that Continental conspired with others to defraud plaintiffs. Plaintiffs also contend that Continental violated the provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 101 et seq., by terminating plaintiffs' employment out of a desire to interfere with plaintiffs' attainment of rights and benefits under a comprehensive benefit program administered by Continental.

In their amendment to the complaint adding the Union as a defendant, plaintiffs contend that the Union

breached its duty of fair representation by (a) failing to provide a reasonable grievance and arbitration procedure for plaintiffs upon the termination of their employment; (b) failing to prepare and prosecute grievances; (c) failing and refusing to make available to plaintiffs administrative remedies provided under the collective bargaining agreement; (d) conspiring with Continental for the plant's shutdown; and (e) conspiring with Continental to terminate plaintiffs' employment without first submitting the proposed plant shutdown through the contractual grievance procedure. Aside from their claim for breach of the duty of fair representation, plaintiffs contend that the Union and Continental conspired to deprive them of their rights provided for in the collective bargaining agreement and other rights by planning to shut down the plant without providing a grievance and arbitration procedure before and after the termination of plaintiffs' employment.

I. Continental's Motion for Summary Judgment (Herein of Grieving the Death of a Plant)

Continental moves for summary judgment on the basis of plaintiffs' failure to attempt to resolve their claims through the grievance and arbitration provisions of the collective bargaining agreement. It is undisputed that no plaintiff initiated a grievance relating to the company's actions in closing Plant No. 411. Equally undisputed is the principle of law set forth in Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965):

> As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress. If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available. But unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf.

379 U.S. at 652-53, 85 S.Ct. at 616 (footnotes and citations omitted). In response, plaintiffs argue that the claims they assert in this action are not within the scope of the grievance and arbitration procedure and that, in

any event, under the circumstances they were excused from the requirement that they first resort to that procedure.

The provisions for the settlement of disputes in the contract establish a four-step grievance procedure culminating in arbitration and preceded by the following relevant language:

> 13.1 Purpose.
>
> The purpose of this Article is to provide an opportunity for discussion of any request or complaint and to establish a procedure for the processing and settling of grievances, as defined in Section 13.2.
>
> 13.2 Definition
>
> A grievance is defined as any difference between the Local Management and the Union or employees as to the interpretation or application of or compliance with this Agreement respecting wages, hours, or conditions of employment. Any dispute over whether a complaint is subject to these procedures shall be handled as a grievance in accordance with the procedures prescribed herein.

Also relevant is the description of the first step in the grievance procedure:

> Within thirty (30) calendar days after wrong complained of was supposed to have happened or started to exist (but if the employee did not find out about the wrong immediately, he will be allowed

thirty (30) calendar days after he reasonably should have found out about it to file the grievance) the employee, with a Grievance Committeeman or Steward, or if he so desires, alone, talks over the grievance with his Supervisor in a sincere effort to settle the problem. This does not preclude the handling of group grievances. (Emphasis added).

[1] There can be little doubt that the grievance and arbitration provisions of the contract in question are sufficiently broad to encompass plaintiffs' claims that they have been wrongfully denied benefits provided by the contract. Plaintiffs' contention that, because they base their claim not on a breach of the collective bargaining agreement but rather on fraudulent misrepresentations and the breach of obligations created by those representations, their claims were not grievable was rejected by this Court in the closely analogous case of Reese v. Mead Corporation, 79 Lab.Cas. (CCH), 11,732 (N.D. Ala. 1975), aff'd mem., 79 Lab.Cas. (CCH), 11,733 (5th Cir. 1976). There the plaintiffs, who had elected under a collective bargaining agreement to receive a severance allowance upon the closing of one of defendant's furnaces at which they worked rather than electing to remain in layoff status, claimed that the defendant deprived them of seniority and pension rights by misrepresenting certain facts on the basis of which plaintiffs made the decision to elect the severance option.

In response to the plaintiffs' argument that their claims based upon fraud could be maintained independently of the collective bargaining agreement, the Court stated:

> In the present case former employees are complaining that statements made by their employer in and about the application of the collective bargaining agreement resulted in a denial of certain benefits that plaintiffs would not have had but for that agreement. The Court concludes that notwithstanding the "fraud" label applied by plaintiffs, the seniority and pension benefit claims are sufficiently bound up in the collective bargaining agreement between [defendant] and the Union to require the application of federal labor law principles recognized in Republic Steel, supra.

As in Reese, plaintiffs' attempt in the present case to separate their claims from the collective bargaining agreement is without merit.

[2] This Court in Reese also addressed the principles for determining the breadth of a grievance and arbitration procedure:

> Having concluded that federal labor policies control this dispute, the Court cannot then escape the strict standards for interpreting the scope of collectively bargained arbitration clauses set out in United Steel Workers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960): there must be either an "express provision

excluding a particular grievance from arbitration" or "the most forcefull evidence of a purpose to exclude the claim form arbitration." 363 U.S. at 585, 80 S.Ct. at 1354.

This Court went on to note the rule established by the Supreme Court for doubtful cases:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

Warrior & Gulf Navigation Co., 363 U.S. at 582-583, 80 S.Ct. at 1353 (footnotes omitted) (emphasis added). As in Reese, where this Court concluded the grievance procedure in the present case applies to "the interpretation of application of or compliance with" the terms of the agreement. The contract in this case also goes further to define a grievance to include any dispute as to whether a complaint is subject to the grievance procedure. In addition, both the insurance agreement and pension plan contain appeal procedures which state that any differences that may arise under those plans "may be taken up as a grievance in accordance with the applicable provisions of the Master Agreement...." Under these provisions and the principles discussed in Reese, it was incumbent upon plaintiffs to attempt, unless otherwise excused, to present their complaints concerning

"fraud" and breach of some "contract" other than the collective bargaining agreement through the grievance mechanism as required in Republic Steel. That exhaustion of remedies requirement is likewise applicable to plaintiffs' claims based upon ERISA. Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980).

[3] Plaintiff's attempt to escape the "strict standards" applicable to such provisions by arguing that the grievance procedure was designed to handle individual disputes with local management and not disputes concerning a corporate decision to close a plant. See Schneider v. Electric Auto-Lite Co., 456 F.2d 366 (6th Cir. 1972) (grievance procedure applicable to disputes "between the foreman and any employee" held inapplicable to disputes arising out of the permanent shutdown of the employer's plant). Given the broad sweep of the provisions at issue in this case, which are much broader than the language at issue in the decision in Schneider upon which plaintiffs rely, the argument is unconvincing. Particularly noteworthy in this connection is the following statement contained in Step 1 of the grievance procedure: "This does not preclude the handling of group grievances." Furthermore, the argument appears to be foreclosed by the decision in Republic Steel, where the Supreme Court found a grievance procedure applicable to an employee's claim for severance pay arising out of a decision to close a mine.

[4] Given that plaintiffs' complaints are within the scope of the grievance and arbitration provisions, they must establish some excuse for failing to attempt to invoke the procedure established in those provisions in order to avoid summary judgment in favor of Continental. It is now well settled, of course, that if an employee can establish his union breached its duty of fair representation in the handling of a grievance, the Union's breach of duty "relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures." Hines v. Anchor Motor Freight, 424 U.S. 554, 567, 96 S.Ct. 1048, 1058, 47 L.Ed.2d 231 (1976); see Vaca v. Sipes, 386 U.S. 171, 185-186, 87 S.Ct. 903, 914-915, 17 L.Ed.2d 842 (1967). Thus, if plaintiffs can avoid summary judgment in favor of the Union on their breach of the duty of fair representation claim, a matter discussed in Part II below, Continental's motion must likewise be denied. In addition to the Union's alleged breach of duty, plaintiffs contend they were excused from resorting to the contractual mechanisms because: (1) any attempt to pursue a grievance would have been futile since "there was no grievance and arbitration procedure remaining subsequent to the termination of plaintiffs' employment," amendment to complaint, Paragraph 39; (2) Continental had repudiated the grievance and arbitration procedure; (3) the claim that the company and the Union conspired to deprive plaintiffs of certain rights could not be

adequately resolved through the grievance procedure since the union would have to prove its own wrongful conduct; and (4) the plaintiffs' claims for punitive damages could not be resolved through the grievance and arbitration procedure since an arbitrator would have no authority to award such damages.

In response to plaintiffs' argument that pursuing grievances would have been futile, Continental asserts that the principle established by the Supreme Court in Maddox "completely forecloses" this line of attack:

> Finally, Maddox suggests that it was not possible for him to make use of the grievance procedure, the first step of which called for a discussion within 30 days of his discharge with his foreman, because a mine that has permanently closed has no foreman—indeed, no employees of any kind. This causistic reading of the contract cannot be accepted. The foreman did not vanish; and it is unlikely that the union grievance procedure broke down within 30 days of Maddox' discharge. In any event, the case is before us on stipulated facts; in neither the facts nor the pleadings is there any suggestion that Maddox could not have availed himself of the grievance procedure instead of waiting nearly three years and bringing a court suit.

Republic Steel Corp. v. Maddox, 379 U.S. at 659, 85 S.Ct. at 619-20. While the Court is unwilling to hold categorically that the above quotation from Maddox

"completely forecloses" plaintiffs' argument, the undisputed facts establish its fatal flaw.

[5] In support of plaintiffs' assertion that pursuit of grievances would have been futile based on the absence of any grievance or arbitration procedure after the plant had closed, several plaintiffs have submitted identical affidavits stating that "we were also advised at the closing of the plant that we should not return to the premises which made it impossible to process any grievance and arbitration procedures should they have been available." However, the undisputed evidence is that the announcement of the plant closing was first made in September of 1979, over two months before the event actually occurred (Gurley Affidavit, ¶ 3). On October 11, 1979, the Union held a meeting with all the employees to discuss the closing yet no claim was raised by any plaintiff or other employee concerning a company promise of continued employment and benefits (Newell Deposition, pp. 13-15, 17-18). Thereafter, a company and union representative met with each individual employee to review the plant closing provisions of the union contract and to discuss the benefits and options available to each employee who was being laid off (Middleton Deposition, pp. 30-31). Layoffs of employees occurred over a two month period in October and November, and on December 21, 1979, the plant ceased operations (Gurley Affidavit, p. 5).

Under the foregoing circumstances it appears that the plaintiffs had full opportunity to raise claims concerning the closing of the plant with company and union representatives with whom they were meeting on that very subject. Had the plaintiffs in fact continuously received promises of lifetime employment and benefits as alleged in the complaint, it seems clear that questions or complaints could have been raised during the two month period following the company's announcement of the breach of these promises. Moreover, according to Continental's Human Resources Manager, Joe Middleton, employees from the plant have in fact filed grievances concerning employee benefits long after the plant closed, those grievances being handled through the staff representative of the Union (Middleton Deposition, pp. 43-46). Therefore, even when the Court fully credits the plaintiffs' statements to the effect that they were told not to return to the plant after it had closed, such evidence does not create a genuine issue of material fact as to whether there was an available and continuing avenue for the filing of grievances directed to any aspect of the plant closure. See Republic Steel Corp. v. Maddox, supra.

[6,7] The second and third excuses plaintiffs set forth—Continental's repudiation of the grievance mechanism and its conspiracy with the Union—appear to lack a factual basis. The Supreme Court noted in Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d. 842

(1967), that an employee need not pursue the remedial procedures established by contract "when the conduct of the employer amounts to a repudiation of those contractual procedures." Id. at 185, 87 S.Ct. at 914. The Court did not elaborate upon what amounts to repudiation but the concept is inapplicable to the present case. Plaintiffs also cite two decisions suggesting that where employees complain of a conspiracy between their employer and their union, their complaints need not be submitted as a grievance. Lusk v. Eastern Products Corp., 427 F.2d 705,708 (4th Cir. 1970); see Battle v. Clark Equipment Co., 579 F.2d 1338, 1345 (7th Cir.1978). Plaintiffs have pointed to no evidence in the depositions or file in support of their conspiracy charge. A careful examination of such depositions has revealed none. The Union has submitted affidavits from two of its officials who were responsible for representing plaintiffs, however, which assert that they have not had any discussion or understanding with Continental or its representatives concerning the rights of the plaintiffs or any other bargaining unit employees to use the grievance procedure, other than discussions in which Continental informed them it was availing itself of the right to close the plant pursuant to the collective bargaining agreement. (Affidavit of Ralph Gurley, ¶ 8; affidavit of David Newell, ¶ 5). The conspiracy charge has no basis in the facts.

[8] The fourth excuse proffered by plaintiffs—that they could not obtain the relief they sought, namely,

punitive damages, through the grievance procedure—is nothing more than a make weight argument.

II. The Union's Motion for Summary Judgment

[9,10] The Union has moved for summary judgment with respect to the claims asserted against it on the grounds that (1) plaintiffs' claims are barred by the applicable statute of limitations, and (2) plaintiffs' claims are unsupportable in light of the undisputed facts. Plaintiffs' claim against the Union for breach of its duty of fair representation is based principally upon their assertions that they were advised at the time of the plant closing by Union officials that the shutdown was not an arbitrable matter subject to the grievance and arbitration procedure. (Plaintiffs' affidavits in opposition to defendants' motions for summary judgment). "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed.2d 842 (1967). Assuming that the Union conduct of which plaintiffs complain amounted to such a breach, it seems clear that the cause of action arose at or near the time of the closing of the plant on December 21, 1979. Applying the six month limitations period prescribed by § 10(b) of the National Labor Relations Act, 29 U.S.C. § 106(b), to plaintiffs' claims, DelCostello v. International Brotherhood of Teamsters, et al., No. 81-2386 (decided June 8, 1983), plaintiffs' claim would be barred since the Union was not added as a defendant until December 7, 1981, when the Court

allowed plaintiffs to so amend their complaint. Plaintiffs, however, argue that the limitations period did not begin to run until they knew or should have known that the Union's alleged statements concerning the grievability of the shutdown were false. According to plaintiffs, they did not discover until August 3, 1981, that their complaint was allegedly subject to the grievance procedures. That assertion is patently erroneous. On December 29, 1980, Continental filed its answer to the complaint along with its petition for removal, both of which asserted that plaintiffs' claims were subject to the grievance and arbitration procedure. Furthermore, the identical affidavits submitted by several plaintiffs, assert: "I do not feel my claim is subject to the grievance and arbitration procedure of the collective bargaining agreement. I did not discover that this might conceivable be subject to the grievance and arbitration procedure until the company filed its answer to our complaint in which they set out as a defense that we had not complied with the grievance and arbitration procedure." Since the Union was not added as a defendant until more than six months following December 29, 1980, which is the latest date on which the six-month limitations period began to run, their claim against the Union for breach of its duty of fair representation is barred.

[11] One it is concluded that the employee can maintain no action against the Union for breach of its duty because of the bar of the statute of limitations,

such a breach no longer furnishes an excuse for failure to resort to the grievance mechanisms before pursuing a claim against the employer. "When the six-month period of § 10(b) has passed, the employee should no longer be able to challenge the alleged breach of duty by his Union, and as this is a precondition for maintaining the contract action, he should not be able to challenge the employer's action either." United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 69, 101 S.Ct. 1559, 1567, 67 L.Ed.2d 732 (1981) (Stewart, J., concurring in the judgment) (footnotes omitted). Since the Union is entitled to summary judgment with respect to the claimed breach of duty of fair representation on the basis of the statute of limitations, the company is also entitled to summary judgment since plaintiffs' failure to resort to the grievance mechanism was not excused as appears hereinabove.

Both motions for summary judgment will be granted by separate order.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT GAVALIK, et al.,
Plaintiffs,

vs. Civil Action No. 81-1519

CONTINENTAL CAN COMPANY,
Defendant.

MEMORANDUM OPINION

BLOCH, District J.

This action charges that the defendant manipulated plaintiffs' length of employment in order to deprive them of certain pension benefits. Continental Can awards a pension to employees who have attained 20 years of continuous service and whose age and years of service total at least 65 and less than 75. Specifically, the complaint alleges that the defendant closed a division of its West Mifflin plant so as to lay the plaintiffs off prior to their 20 years of service. Furthermore, the complaint alleges that the defendant continued thereafter to meet its production needs by working the employees overtime, rather than calling plaintiffs back.

This action is brought pursuant to § 510 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1140, which provides, "It shall be

unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary...for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an employee benefits plan]."

Defendant has filed a motion to dismiss for plaintiffs' failure to exhaust the grievance procedure set forth in Section 7 of the Pension Agreement between the defendant and the United Steelworkers of America, the collecting bargaining agent of plaintiffs. Section 7 provides:

> "If, during the terms of this Agreement, any differences shall arise between the Company and any employee who shall be an applicant for the lump sum retirement allowance, pension or deferred benefit as provided in this Agreement, as to whether or not such employee is entitled to or as to the amount of such lump sum retirement allowance, pension or deferred benefit, such differences...may be taken up as a greivance..."

First, we do not believe that the plaintiffs' claim falls within the terms of the above-quoted provision since they are, at this time at least, neither applicants for a pension nor in dispute with the defendant as to whether or not they are entitled to a pension. The plaintiffs' claim is not that they have been denied their pensions, but that they have been denied the opportunity to eventually become entitled to a pension. Second, and perhaps more importantly, we believe that § 510 of ERISA has conferred on plaintiffs a statutory right independent of the collective bargaining agreement, which may be enforced in court independent of the grievance procedure.

In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1973), the Supreme Court held that an individual's right to equal employment opportunity under Title VII was independent of an employee's non-discrimination rights under a collective bargaining agreement, and that an employee's initial resort to the grievance procedure did not preclude a later court action. The Court noted the drawbacks to submitting a statutory dispute to arbitration. These included the fact that an arbitrator is an expert in "the law of the shop, rather than the law of the land," Id. at 57. Furthermore, arbitrable fact finding is not usually equivalent to judicial fact finding; the rules of evidence usually do not apply; the record of the arbitration proceedings is not complete and

discovery, compulsory process, cross-examination, and testimony under oath are often limited or unavailable.

Similarly, in Barrentine v. Arkansas-Best Freight System, Inc., __U.S.__, 101 S.Ct. 1437 (1981), the Court concluded that an employee's right to minimum wages under the Fair Labor Standards Act, 29 U.S.C. § 201, et. seq., was independent of his right to collectively-bargained for wages. Thus, a Court can entertain an independent action pursuant to the FLSA, even after a grievance has been filed and processed. The Court noted:

> "Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitrable decision where the employee's claim is based on rights arising out of the collective bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers."

Like the minimum wage provisions of the FLSA, we find ERISA's guarantee that an employee shall not be discriminated against in order to deprive him of his pension rights to be a minimum substantive guarantee to individual workers enforceable in a court of law. Scheider v. United States Steel Corporation, 486 F.Supp. 211 (W.D.

Pa. 1980), relied upon by the defendant, is not to the contrary. Scheider was not brought to secure rights protected by § 510 of ERISA but to secure rights protected by a pension plan.

The questions presented by the plaintiffs' suit, involving as they do subtle questions of intent and state of mind, are better decided in court after a full discovery process and with the procedural safeguards provided by normal court procedures. For these reasons, the defendant's motion to dismiss is denied and its motion to stay discovery pending decision of the motion to dismiss is moot.

An appropriate Order will be issued.

Date:3/26/82

[original signed by judge]
United States District Judge

ORDER

AND NOW, this 26th day of March, 1982, upon consideration of Defendant's Motion to Dismiss filed in the above captioned matter on March 4, 1982,

IT IS HEREBY ORDERED that said Motion is DENIED.

[original signed by judge]
United States District Judge

cc: Daniel P. McIntyre, Esquire
Five Gateway Center, Pittsburgh, PA 25111.

Henry J. Wallace, Jr., Esquire
747 Union Trust Building, Pittsburgh, PA 15219.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT GAVALIK, et al.,
Plaintiffs,

vs. Civil Action No. 81-1519

CONTINENTAL CAN COMPANY,
Defendant.

ORDER

AND NOW, this 29th day of July, 1982, upon consideration of Defendant's oral Motion for Reconsideration made at the status conference on March 26, 1982,

IT IS HEREBY ORDERED that said Motion is GRANTED, and finding ourselves in disagreement with Kross v. Western Electric Co., Inc., CA 30 C-5208 (N.D. Ill. Feb. 1, 1982), this court hereby AFFIRMS the Order of March 26, 1982, denying the Defendant's Motion to Dismiss.

[original signed by judge]
United State District Judge

cc: Daniel P. McIntyre, Esquire
Five Gateway Center, Pittsburgh, PA 15222.

James D. Morton and Samuel W. Braver, Esquires
57th Floor, U. S. Steel Building, Pittsburgh, PA
15219

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT GAVALIK, FRANK GRELO,
JOSEPH URBAN, ANTHONY ULYAN
DONALD CLARKE, HENRY FOSTER,
GEORGE PATTERSON, JOSEPH
KELLERMAN, ROBERT PAVLIK,
PHILLIP FARLEY, THOMAS
RILEY, THOMAS WARREN and
FRANCIS HUMENIK,

Plaintiffs,

vs. Civil Action No. 81-1519

CONTINENTAL CAN COMPANY,

Defendant.

ALBERT J. JAKUB, FRED
CIPRIANI, JR., ANTHONY
J. BERNARDO, THOMAS A. MULLIGAN,
WILLIAM T. TARR, DONALD W.
ROBERTS, ERNEST WIRBECKI,
GEORGE W. STEPANIC,
ALFRED BORELLI, JR.,
ANTHONY FOLINO, THOMAS E. JOHNSTON,

ROBERT KAPOLKA, JOHN C. KINCEL,
PETER A. RUMAIN,
HARRY H. SMITH, MELVIN J.
SMITH, JACK A. STULL,
FRANK A. BLASKO and
JOHN E. KOCZKA, on
behalf of themselves
and others similarly situated,

Plaintiffs,

vs. Civil Action No. 82-1995

CONTINENTAL CAN COMPANY,
a member of
Continental Group, Inc.

Defendant.

MEMORANDUM OPINION

BLOCH, District J.

Plaintiffs allege in these consolidated cases that the defendant manipulated plaintiffs' length of employment in order to deprive them of certain pension benefits. Specifically, the parties' collective bargaining agreement provides for the payment of an "early pension" — referred to as the Rule of 65 and 70/75 Plans — in the event of a plant shutdown or permanent layoff. Only those employees who have the 20 years of experience necessary under the Rule of 65 Plan and the 15 years of experience necessary under the 70/75 Plan, combined with an age factor, are eligible for the benefits. Plaintiffs complain that the defendant closed a division of its West Mifflin plant for the purpose of laying off plaintiffs prior to their entitlement to these benefits. Furthermore, the plaintiffs contend that the defendant continued to meet its production needs thereafter by working its employees overtime to avoid calling the plaintiffs back to work.

This action is brought pursuant to § 510 of the Employment Retirement Income Security Act of 1974 (hereinafter referred to as "ERISA"), 29 U.S.C. § 1140, which provides that "[i] t shall be unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary...for the purpose of interfering with the attainment of any right to which such participant may become entitled

under [an employee benefit plan.]" The defendant filed motions to dismiss on March 8, 1983, and June 15, 1983, in Civil Action No. 82-1995, which this Court will deny.

In its motion filed on March 8, 1983, the defendant seeks dismissal on various grounds. The first asserted basis for dismissal is that the complaint fails to state a cause of action because the Rule 65 and 70/75 Plans do not fall within 29 U.S.C. § 1140. Without doubt, these plans do fall within the statutory definition of "employee benefit plan." 29 U.S.C. § 1002(3). See also Kross v. Western Electric Co., Inc., 701 F.2d 1241-43 (7th Cir. 1983).

Defendant's second basis for moving for dismissal is that the complaint fails to state a cause of action because ERISA does not preclude consideration of operating costs, including pensions, in the management of a business. This statement of the issue does not accurately reflect the complaint. Plaintiffs are asserting that defendant deliberately followed a plan for avoiding pension liability as a means of increasing its profits, not that it deliberately increased plant profitability by a means that happened to effect employees' eligibility for pension benefits. The former conduct is a violation of ERISA; the latter conduct is not charged by the plaintiffs.

For its next ground for dismissal, defendant raises the plaintiffs' failure to exhaust their remedies. This contention has been previously rejected by this Court in its opinion in Civil Action No. 81-1519, which has since

been consolidated with this case. This Court recognizes that the Seventh Circuit subsequently reached the opposite result in Kross v. Western Electric Co., Inc., 701 F.2d 1238, 1243-45 (1983). Also, this Court is well aware of the Third Circuit's frequent admonitions that "[i]f there is any expression of public policy pertaining to labor-management relations that has emerged loud and clear in today's jurisprudence it is the national policy favoring arbitration of labor disputes." However, after a thorough review of the opinion in Civil Action No. 81-1519, the Kross decision, and Third Circuit law on the arbitrability of labor disputes, this Court reaffirms its decision in Civil Action No. 81-1519 and holds it applicable to its companion case, Civil Action No. 82-1995.

The final ground for dismissal asserted in the first motion is that this action is barred by the statute of limitations. Both parties agree that 29 U.S.C. § 1132 and § 1140 do not provide a specific limitations period and that the appropriate period is determined by reference to the state statute of limitations governing cases most analogous to the cause of action asserted by the plaintiffs. Defendant first argues that the Supreme Court decision of DelCostello v. International Brotherhood of Teamsters, — U.S. —, 51 U.S.L.W. 4693 (June 8, 1983) mandates the application of a six-month statute of limitation. Since DelCostello dealt with the statutory limitation to be applied to actions filed after

binding arbitration, it is wholly inapplicable to this case. Defendant's next contention is that the two-year statute of limitations which governs actions for intentional interference with contractual relations is most analogous to this action. This Court disagrees, concluding that the cause of action alleged by plaintiffs is most analogous either to an action charging employment discrimination or a suit alleging breach of a fiduciary duty, both of which are subject to the 6-year residuary period of limitations set forth in 42 Pa.C.S.A. §5527(6). See Knoll v. Springfield Township School District, 699 F.2d 137, 145 (3d Cir. 1983) (appeal pending); Weisen v. Reichett, — F. Supp. —, 111 LLRM 3136 (W.D. Pa. 1982).

The plaintiffs filed suit on September 27, 1982, alleging that discriminatory layoffs of defendant's employees to avoid pension liabilities began in 1976 and continued until the relocation of the pail line in the winter of 1977-1978. From the face of the complaint, the Court is unable to determine whether the discriminatory layoffs of any of the named plaintiffs occurred prior to September 27, 1976. The defendant, as the moving party, has the burden of proving that the statute of limitations bars this action, and defendant has

failed to come forward with evidence to support its contention.[1]

In its second motion, the defendant seeks dismissal for failure to join a necessary or indispensable party; or, in the alternative, joinder of the United Steelworkers of America. Fed. R. Civ. P. 19, which governs disposition of the motion, provides in relevant part:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

---

[1]The Court has reviewed a pending motion for class certification and found the proposed class poorly defined. The Court recognizes that the issue of when the statute of limitations begins to run may need to be addressed in setting the temporal limitations of any class which may be certified subsequently.

There is no basis for finding either Rule 19(a)(1) or (a)(2) applicable in this case. See also Hodgson v. Board of Education, Parsippany-Troy Hills, 344 F. Supp. 79 (D. N.J. 1972), appeal dism'd, (3d Cir. 1972).

Insofar as the defendant seeks joinder of the United Steelworkers of America pursuant to Fed. R. Civ. P. 14 and 21, it is important to note that a motion for joinder under these rules is not automatic; rather, the decision to permit joinder rests with the sound discretion of the trial court. Judd v. General Motors Corp., 65 F.R.D. 612, 615 (M.D. Pa. 1974). In Judd, the District Court set forth the following three factors for a trial court to consider in determining whether to permit joinder: (1) the timeliness of the motion; (2) whether the filing of the third-party complaint will introduce an unrelated controversy or will unduly complicate the case to the prejudice of the plaintiff; and (3) whether the third-party complaint will avoid circuity of action and settle related matters in one suit. The defendant was served with the complaint in Civil Action No. 81-1519 on September 18, 1981. The defendant filed its motion to join the United Steelworkers of America as a third-party defendant on June 15, 1983, in Civil Action No. 82-1995. Thus, this Court concludes that the motion to join the United Steelworkers of America as a third-party defendant pursuant to Rule 14 and 21 is untimely filed.

An appropriate Order will be issued.

Date: 12/15/83

[original signed by judge]
United States District Judge

cc: Counsel of record.

§ 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the

United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing

for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

(Pub.L. 93-406, Title I, § 2, Sept. 2, 1974, 88 Stat. 832.)

§ 1110. Exculpatory provisions; insurance

(a) Except as provided in sections 1105(b)(1) and 1150(d) of this title, any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.

(b) Nothing in this subpart[1] shall preclude—

(1) a plan from purchasing insurance for its fiduciaries or for itself to cover liability or losses occurring by reason of the act or omission of a

fiduciary, if such insurance permits recourse by the insurer against the fiduciary in the case of a breach of a fiduciary obligation by such fiduciary;

(2) a fiduciary from purchasing insurance to cover liability under this part from and for his own account; or

(3) an employer or an employee organization from purchasing insurance to cover potential liability of one or more persons who serve in a fiduciary capacity with regard to an employee benefit plan.

(Pub.L. 93-406, Title I, § 410, Sept. 2, 1974, 88 Stat. 886.)

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any

provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect[1] to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary or the Treasury, or

(3) one or more participants, beneficiaries, or fiduciaries, of such plant request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(c) Administrator's refusal to supply requested information

Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the adminsitrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United

States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan–

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not

intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may asses a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of Title 26); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(Pub.L.93-406, Title I § 502, Sept. 2, 1974, 88 Stat. 891; Pub.L.96-364, Title III, § 306(b), Sept. 26, 1980, 94 Stat. 1295.)